

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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HENRIETTA MELTZER, et al.,

Plaintiff(s),

**REPORT AND
RECOMMENDATION**

-against-

CV 03-5521 (JS) (WDW)

ROYAL ACCEPTANCE CORP., et al.,

Defendant(s).

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WILLIAM D. WALL, United States Magistrate Judge:

The pro se defendant/third-party plaintiff, Richard Toporek, failed to appear at a conference held on May 19, 2006, despite having been directed to do so by the undersigned in an order dated April 12, 2006. That order expressly warned Mr. Toporek that failure to appear at the conference would result in a recommendation to Judge Seybert that his answer be stricken, that plaintiffs be given leave to move for a default judgment against him, and that his third-party action be dismissed with prejudice.

The defendant has repeatedly ignored the orders of this court and the undersigned's warning that if he failed to comply with orders, a recommendation that his answer be stricken would be made to Judge Seybert. Thus, the undersigned now recommends that Toporok's answer be stricken and that plaintiffs be given leave to move for a default judgment against him.

The undersigned further recommends that defendant Toporek's third-party complaint be dismissed with prejudice for failure to prosecute. See Fed. R. Civ. P. 41(b). Rule 41(b) gives the district court power to dismiss a complaint "for failure to comply with a court order, treating noncompliance as a failure to prosecute." *Simmons v. Abruzzo*, 49 F.3d 83, 87 (2d Cir. 1995). It is well settled that a dismissal under Rule 41(b) "operates as an adjudication on the merits and that such a dismissal is with prejudice." *Hoffman v. Wisner Classic Mfg. Co.*, 927 F. Supp. 67, 71 (E.D.N.Y. 1996) (citing *Link v. Wabash R. Co.*, 370 U.S. 626, 630-32 (1962)). Here, Mr. Toporek has failed to prosecute the case since April 2005 and failed to comply with the undersigned's orders to appear.

A copy of the Report and Recommendation is being sent by mail to Mr. Toporek and by electronic filing to plaintiffs. Any objections to this Report and Recommendation must be filed with the Clerk of the Court with a courtesy copy to the undersigned within 10 days of service. Failure to file objections within this period waives the right to appeal the District Court's Order.

See 28 U.S.C. §636 (b) (1); Fed. R. Civ. P. 72; *Beverly v. Walker*, 118 F.3d 900, 902 (2d Cir. 1997); *Savoie v. Merchants Bank*, 84 F.3d 52, 60 (2d Cir. 1996).

Dated: Central Islip, New York
May 19, 2006

/s/ William D. Wall

William D. Wall
United States Magistrate Judge